No. 16131

In the United States Court of Appeals for the Ninth Circuit

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT,

v.

HELMER F. LINDGREN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

On June 7, 1957, appellee's claim for old-age insurance benefits was finally denied by the Secretary of Health, Education and Welfare. Appellee instituted this action in the United States District Court for the District of Oregon on July 23, 1957 to obtain review of this denial. (R. 17). The jurisdiction of the district court was invoked under Section 205(g) of the Social Security Act, as amended, 42 U.S.C. 405(g). Judgment was entered against the United States on June 9, 1958 and a notice of appeal was filed July 2, 1958. (R. 18). The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

On his 1951 Federal income tax return, appellee, Helmer F. Lindgren, reported self-employment income of $1,428.46, all of which was derived from farming activities such as the raising and selling of fryers. (R. 22-23). The Social Security Administration determined that appellee was solely engaged in an agricultural enterprise and accordingly advised appellee, in the latter part of 1952, that his earnings were excluded from coverage.[1] (R. 23). Thereupon, appellee consulted his attorneys and inquired of them whether, despite the agricultural nature of his occupation, there was some way in which he could obtain social security coverage. (R. 23, 33-34). Appellee's attorneys informed him that the desired result could be achieved if appellee incorporated his business and then hired himself as an employee. (R. 23, 34).

On his attorney's advice, appellee formed a corporation, Lindgren and Company, on February 2, 1953, and transferred to it assets worth $2,500.[2] (R. 23, 62 and Tr. 94). The corporation issued 25 shares of stock. Appellee and his wife took 24 shares and the other share was given to Shirley W. Barker, appellee's stepson, who was a director and vice president of the corporation.[3] (R. 23-24). Appellee has been the president of the corporation from its inception, and his wife has

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[1] In 1952, earnings derived from self-employment in an agricultural enterprise were excluded under 42 U.S.C. 411 (a)(2); this restriction has been subsequently removed by Act of September 1, 1954, c. 1206, 68 Stat. 1055.

[2] For reasons of economy, Lindgren and Company took over the articles of incorporation of Snow-Williams Motors, Inc., which was an inactive corporation at that time (R. 23, 58).

[3] At that time, Oregon corporation law required that a director be a stockholder. This law was repealed in August of 1953 and Barker then endorsed his share back to appellee and his wife (R. 53-54).

been the secretary and treasurer. (R. 24). The latter, however, never has received any remuneration for her services. (R. 24).

In its incorporated form, the business was operated just as it had been conducted when it was a sole proprietorship. (R. 25). The enterprise engaged in exactly the same pursuits as before. (R. 22-23, Tr. 94). Appellee still operated the business by himself. (R. 25, 34-35). And, by reason of his stock ownership in, and status as president of, the corporation, appellee had complete control over the affairs of the corporation, including its finances and matters of fiscal policy. (R. 23-25, 33).

On February 13, 1953, eleven days after incorporation, there was a meeting of the Board of Directors of Lindgren and Company—*i.e.,* appellee, his wife and stepson. At that meeting appellee proposed that his salary be fixed at $300 per month ($3,600 per year)[4] and that it be paid retroactive to January 1, 1953 (a month prior to incorporation). (R. 24). The Board unanimously adopted this proposal. (Tr. 89). On the same day, appellee loaned $800 to the corporation. (R. 75-76).

The business, however, did not fare much better in its incorporated form than it had in 1951—when appellee's endeavors had netted less than $1,500. (R. 22). The result was that the corporation's income (after the payment of all other expenses) was considerably less than appellee's salary of $3,600 per year. (R. 26.) Rather than reduce appellee's salary to an amount

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[4] It is noteworthy that in 1953 the maximum income that would be credited to an individual's social security insurance coverage was $3,600 a year, which is the exact amount at which appellee's salary was set. See, 42 U.S.C. 415(a)(1), and 409(a).

which would have been compatible with its financial circumstances, the corporation borrowed an additional $1,100 from appellee in 1953 (making a total of $1,900 for that year) and $1,000 in 1954. (R. 26-27). On at least one occasion, appellee endorsed his salary check back to the corporation and deposited it in the corporation's bank account. (R. 27). While these loans were evidenced by demand promissory notes, in the total amount of $2,900 and bearing interest at the rate of 2% per annum, the corporation's discharge of the obligation was limited to a single $600 payment on December 31, 1951. (R. 73-76, 27). The notes were unsecured [5] and were not repayable at any stated date. (R. 73-76).

The precise financial situation of the corporation is reflected in large measure by the Federal and state corporation tax returns which were filed for the years 1953 and 1954.[6] (See R. 77-86 and Tr. 154-158, 164-

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[5] Appellee stated that he looked to $2,500 worth of co-op certificates, which represent rebates on feed and which are held by Lindgren & Co., for the repayment of these loans. (R. 49-50). However, the promissory notes issued to appellee do not state that they are secured by these certificates or any other assets of the corporation. (R. 73-76). Moreover, in 1953 the corporation held only $550 worth of these certificates, and in 1954 it received only an additional $320 worth of certificates, so that the highest value of certificates held by the corporation during 1953-1954, the years when the loans were made, was only $870. (R. 51).

[6]

Income	1953	1954
Fryer sales	$ 8,344.40	$ 7,950.68
Meat sales	327.56	643.09
Egg sales	330.10	8.53
Sack sales	145.36	158.72
Feed rebate	556.75	675.57
Interest	27.50	43.50
Total	$9,731.67	$9,480.09

[Footnote 6 continued on page 5]

168). For example, it appears from these returns that, considering appellee's salary as an expense, the business operated during this period at a total loss of approximately $1,700.

Actually, from one standpoint, the corporation's loss was considerably larger than the tax returns indicate. Neither the 1953 nor the 1954 return makes reference to the rental expense for the farm on which the corporation was doing business. In 1955, it was agreed that $50 was a fair monthly rental and that sum was thereafter paid. (R. 44-45). Garthe Brown, an attorney for appellee, stated that the rent was not paid in 1953 and 1954 because the corporation did not have sufficient funds at that time, but that $1,200 rent for those two years is still an outstanding obligation of the corporation. (R. 55-56, 28-29). If the $1,200 had been included in determining the corporation's losses for 1953 and 1954, the total loss would have amounted to approximately $2,900—in other words, equal to the amount which appellee loaned the corporation.

Appellee reached the age of 65 on March 31, 1954.

[Footnote 6 continued from page 4]

Expenses

	1953	1954
Feed	$ 6,877.73	$ 6,126.74
Compensation of officers	3,600.00	2,925.00
Taxes:		
Social Security	54.00	58.00
Corporation	10.00	10.00
Depreciation	20.00	20.00
Briquets	144.70	22.40
Chickens	86.00	16.00
Hay	265.00	175.68
Electricity	163.35	122.76
Calves	52.00	39.00
Legal and Accounting	103.06	
Total	$11,375.84	$9,516.08

(R. 21). He filed an application for social security benefits on October 25, 1954, but he later withdrew that application and filed a second application on January 4, 1955. (R. 21.) In September, 1954, immediately prior to the filing of appellee's first application, his salary was reduced from $300 a month to $75 a month. (R. 24). Under the Social Security Act as it read at that time, a beneficiary under 75 years of age was not entitled to full social security benefits in any month in which he received wages of more than $75. See, 42 U.S.C. 403(b)(1).

Effective January, 1955, the Act was amended to permit an individual to earn $1,200 a year without incurring any loss of benefits. See, 42 U.S.C. (Supp. II) 403(b)(1). In April 1955, appellee's salary was accordingly raised to $100 a month (*i.e.*, $1,200 a year). (R. 25).

Both of appellee's applications were based upon his employment with the corporation for the years 1953 and 1954. (R. 21). On October 30, 1956, the Social Security Administration notified appellee that his application was disallowed for the reason that he had only one of the six quarters of coverage that are necessary to be a fully insured individual. (R. 21). Appellee then requested a hearing before a referee. Following the hearing, the referee determined that, except for $744.84, appellee was not paid "wages" in 1953 and 1954 within the meaning of Section 209 of the Social Security Act, *infra*, pp. 9-10. (R. 29).

The referee concluded that that part of appellee's "salary" which was in excess of the company's earnings for 1953 and 1954, while paid to him in the form of "wages," was, in fact, a return of capital that he had advanced the corporation. (R. 29). He further con-

cluded that, exclusive of the compensation paid appellee, the corporation earned a net profit of $744.84 in 1953-1954 and consequently that was the amount that the corporation had available with which to pay wages.[7] (R. 29). In support of his view that, therefore, only $744.84 represented wages for the purpose of social security coverage, the referee pointed out (R. 30-31):

> Where an employee exercises control over a corporation because of stock ownership and his power as a director or officer, transactions between him and the corporate entity require very close scrutiny to distinguish between "wages," on the one hand, and dividends or distribution of corporate assets on the other. Here, the claimant, who was the president and stockholder of a corporation whose

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[7] The referee computed this amount as follows:

	1953	1954
Expense including salary	$11,375.84	$9,516.08
Less salary	3,600.00	2,925.00
Expense without salary	7,775.84	6,591.00
Income	9,731.67	9,480.09
Less Expense without salary	7,775.84	6,591.08
Net profit before deducting loans and rent	1,955.83	2,889.01
Less loans by claimant	1,900.00	1,000.00
	55.83	1,889.01
Less rent	600.00	600.00
Net profit without salary	544.17	1,289.01
Net loss in 1953		544.17
Net profit for 1953 and 1954 available for salary		744.84

stock was owned exclusively by himself and his wife, advanced money to it when necessary and withdrew funds from the corporation at irregular intervals and in irregular amounts as funds were available and in accordance with his personal needs. The referee has noted above that initially the claimant's salary was set at the exact maximum creditable for social security purposes, and that subsequently changes in salary were made for no apparent reason except to permit continuous benefit payments without deductions because of wages or earnings in excess of the statutorily-permitted amounts. Although the referee assumes good faith on the part of the claimant, he regards the case of *Gancher* v. *Hobby,* 145 F. Supp. 461 (D. Conn. 1955) as of precedent value in the disposition of the instant claim.

Also, the referee noted a certain looseness in the financial relationship between Lindgren and the corporation in that whenever Lindgren needed money he would take it from the corporate funds as an "advance" on his wages, and he would repay these advances upon receiving his salary. (R. 27-28). The district court, citing *MacPherson* v. *Ewing*, 107 F. Supp. 666 (N.D. Cal.), held that the referee's decision "must be considered, in law, to be arbitrary and capricious." (R. 10-12). Accordingly, the court denied the Government's motion for summary judgment and on June 8, 1958, entered judgment for appellee, allowing his claim for old-age insurance benefits. (R. 14-15).

STATUTES INVOLVED

The pertinent sections of the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. 401 *et seq.*, provide:

§ 202. [42 U.S.C. 402] *Old-age and survivors benefit payments—insurance benefits.*

Every individual who—

(a) is a fully insured individual (as defined in section 414(a) of this title) * * * shall be entitled to an old-age insurance benefit for each month * * * such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.

§ 205(g). [42 U.S.C. 405(g)]. *Review.*

Any individual, after any final decision of the Administrator [8] made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action * * *. As part of its answer the Administrator shall file a certified copy of the transcript of the record, including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Administrator, with or without remanding the cause for a rehearing. The findings of the Administrator as to any fact, if supported by substantial evidence, shall be conclusive * * *.

§ 209. [42 U.S.C. 409]. *Definition of wages.*

For the purposes of this subchapter, the term "wages" means * * * a remuneration paid after 1950 for employment * * * except that in the case

[8] Under Reorganization Plan No. 1 of 1953 the office of Federal Security Administrator was abolished and all functions of the Administrator were transferred to the Secretary of Health, Education and Welfare.

of remuneration paid after 1950, such term shall not include—

(a) That part of the remuneration which after remuneration * * * equal to $3,600 with respect to employment has been paid to an individual during any calendar year, is paid to such individual during such calendar year.

§ 214. [42 U.S.C. 414]. *Insured status for purpose of old-age and survivors insurance benefits.*

For the purposes of this subchapter—

(a) *Fully insured individual.*

(2) In the case of any individual who did not die prior to September 1, 1950, the term "fully insured individual" means any individual who had not less than—

(A) one quarter of coverage * * * for each two of the quarters elapsing after 1950, or after the quarter in which he attained the age of twenty-one, whichever is later * * * except that in no case shall an individual be a fully insured individual unless he has at least six quarters of coverage * * *.

§ 215.[9] [42 U.S.C. 415]. *Computation of primary insurance amount.*

For the purposes of this subchapter—

(a) *Primary insurance amount.*

(1) The primary insurance amount of an individual * * * with respect to whom not less than six of the quarters elapsing after 1950 are quarters of coverage shall be 55 per centum of

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[9] The amendment to Section 415, found in 42 U.S.C. (Supp. II), 415 does not apply to appellee.

the first $100 of his average monthly wage plus 15 per centum of the next $200 of such wage * * *

SPECIFICATION OF ERRORS RELIED UPON

1. The district court erred in holding in effect that the Secretary was required to accept appellee's characterization of certain exchanges of funds, between the appellee and a corporation controlled by him, as wages.

2. The district court erred in holding in effect that the Secretary could not look through form to substance in determining whether, in fact, the purported "wages" were remuneration paid for employment, as required by § 209 of the Social Security Act (42 U.S.C. 409).

3. The district court erred in failing to hold that there was substantial evidence in the record to support a finding by the Secretary that a large part of the purported "wages" paid to appellee was, in fact, not remuneration for employment.

4. The district court erred in denying the action of the Secretary for summary judgment.

5. The district court erred in entering judgment for appellee.

SUMMARY OF ARGUMENT

The district court erred in holding in effect that the Secretary was obligated to accept appellee's formal characterization of the transfer of funds between him and a corporation solely controlled by him as "wages." To the contrary, the Secretary was entitled to scrutinize the transactions in order to determine whether they were, in fact, remuneration for services rendered. In the instant action, the Secretary examined the circumstances surrounding the payment of appellee's "salary" and found that a large part of the purported salary

was merely a return of capital and advancements and, therefore, did not qualify as "wages" under the Social Security Act. The record lends ample and convincing support to this finding.

ARGUMENT

I

The Secretary Is Not Required to Accept Appellee's Characterization of the Transfer of Funds Between Appellee and a Corporation Controlled by Him as Wages

In reversing the determination of the Secretary, the court below apparently proceeded on the assumption that, if a bona fide employment relationship existed, no inquiry could be made by the Secretary into whether the purported wages were, in fact, remuneration for services performed. Since the referee had found such a relationship to exist between appellee and the company which was wholly controlled by appellee, the court therefore concluded that it was irrelevant whether the "salary" which appellee had established for himself was, in whole or in part, a sham.

If the district court were correct in this assumption, an individual could obtain full social security insurance benefits for a negligible sum by the simple expedient of establishing a corporation one year and one-half (six quarterly periods) before he becomes eligible for benefits, hiring himself as an employee and loaning the corporation a sufficient amount of money to pay him a "salary". *Kossman* v. *Folsom*, 157 F. Supp. 157, 158 (E.D. N.Y.), severely criticized a legal theory which would permit such easy access to a lifetime annuity from Government funds. Clearly, Congress could not have intended that the Social Security Act should be so abused.

The prior judicial decisions in this area lend no sup-

port to the theory of the court below that form must be given precedence over substance insofar as the administration of the Social Security Act is concerned. It is well settled that the Secretary may disallow purported wages paid to a claimant, on the ground that there was no bona fide employment relationship existing between the recipient and the payor of the putative salary. See *e.g.*, *United States* v. *Lalone*, 152 F. 2d 43 (C.A. 9); *McGrew* v. *Hobby*, 129 F. Supp. 627 (D. Kan.); *Thurston* v. *Hobby*, 133 F. Supp. 205 (W.D. Mo.); and *Murray* v. *Folsom*, 147 F. Supp. 298 (D. D.C.). *A fortiori*, the Secretary may examine the validity of the purported wages, itself, to determine whether they were actually paid as remuneration. Directly in point is *Gancher* v. *Hobby*, 145 F. Supp. 461 (D. Conn.), upon which the referee relied (R. 31).

In the *Gancher* case, the claimant was a doctor and therefore his self-employed income was excluded from coverage under the Social Security Act. The claimant organized a corporation with his wife, daughter and himself as the corporate officers, and then transferred a building to the corporation. The building contained the claimant's business office and three apartments. The claimant was paid $300 a month as "wages" for collecting the rent for the three apartments and the office. The district court held that the payments made to the claimant were not "wages" within the Act, but were part of a "slick scheme" engineered for the purpose of improperly acquiring contributions for the claimant's support from the Social Security Administration.[10] The court then held (145 F. Supp. at 463):

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[10] It is significant that in its holding the district court noted that the salary paid to claimant, as was the salary paid to appellee in the instant action, was the exact amount that was necessary to obtain maximum coverage under the Act. 145 F. Supp. at 463.

> There is nothing improper or questionable about a person entering a bona fide employment for the express purpose of acquiring a wage record which will enable him to qualify for an old-age insurance benefit. Such action is clearly within the spirit as well as the letter of the law. However, it is a far different thing to create a relationship and *give to certain payments the color of "wages" for the purpose of qualifying under a law such as the one here in question. That is neither within the letter nor the spirit of the law.* [Emphasis added.]

MacPherson v. *Ewing*, 107 F. Supp. 666 (N.D. Cal.), upon which the district court relied in the instant action, is clearly distinguishable. In *MacPherson,* the Federal Security Administrator[11] disallowed eight monthly payments of $300 made to the insured while he was ill on the ground that these payments were made out of generosity and were not "wages" within the Act. The district court reversed on the ground that, absent any fraud or deceit, the motive of the employer is immaterial.

What the court below here ignored, however, is that in *MacPherson* the employer and employee were strangers who were dealing with each other, at arm's length; while in the present action, the payments were made between a corporation, which was controlled by the claimant, and the claimant himself. All that *MacPherson* holds is that, when there is a valid employer-employee relationship between two parties who were dealing with each other at arm's length, the Secretary

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[11] The functions of the office of Federal Security Administrator were transferred to the Secretary of Health, Education and Welfare in 1953. See p. 9, n. 8, *supra.*

cannot exclude the wages paid either because of the motive of the employer or because the value of the services rendered was inadequate to support the salary given. The court's reasoning presumably was that any other result might well place too great a burden upon a claimant as he would not only have to establish that wages were paid to him, but also that they were deserved.

MacPherson cannot possibly be made to stand for the proposition that, where the claimant is an employee of a corporation that he controls, the transactions between the two parties may not be carefully scrutinized in order to determine whether there existed more than mere bookkeeping entries motivated by the coverage requirements of the Social Security Act. Cf. *Wilshire & Western Sandwiches, Inc.* v. *Commissioner*, 175 F. 2d 718, 721 (C.A. 9). Although denominated a separate legal entity, a corporation which is controlled by one employee is essentially the alter ego of that employee, who is therefore in a position to obtain social security insurance benefits by merely attaching a label to certain transfers of property that are in actuality transactions with himself. Consequently, the fact that in the instant action the parties labelled certain transfers of money to the appellee as "wages" is not conclusive upon the Secretary, who may disregard the form of such payments and treat them as what they actually are, *viz.*, a return of capital and advancements. *Gancher* v. *Hobby*, *supra*. Cf. *Higgins* v. *Smith*, 308 U.S. 473, 477.

While the Supreme Court has not had occasion to pass upon the question in its present context, it is to be noted that that Court has indicated that the Secretary has the power to disallow certain payments, as not being "wages" within the Act. In *Social Security Board* v.

Nierotko, 327 U.S. 358, the Social Security Board has refused to treat "back pay," which the claimant had received from his employer by virtue of an order of the National Labor Relations Board, as "wages" under the Social Security Act. Noting that the Social Security Board had based its decision upon its interpretation of the statute involved [12] and not upon a finding of fact or any conclusion drawn therefrom, the Court held that the Board's interpretation was incorrect as a matter of law. It went on, however, to observe that (327 U.S. at 369):

> Congress used a well understood word—"wages" —to indicate the receipts which were to govern taxes and benefits under the Social Security Act. *There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.* [Emphasis added.]

While the Court was referring to the finality of the administrative decision there, it is implicit from this observation that not every payment to an employee constitutes "wages", and that the Secretary is free to make a determination on that issue where, as in the instant action, there are factual considerations present.

II

The Record Fully Supports the Secretary's Determination That a Large Part of the Sums Transferred from Lindgren & Co. to Appellee Was Not Remuneration for Services Rendered, But Was, in Fact, a Return of Capital

42 U.S.C. 405(g) provides that the findings of the Secretary "as to any fact, if supported by substantial

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[12] Now, 42 U.S.C. 409.

evidence, shall be conclusive." It is well settled that a court may not susbtitute its judgment for that of the Secretary of Health, Education and Welfare, and that the conclusions and inferences which the Secretary has drawn from its findings are equally conclusive upon the court. See *e.g., Gray* v. *Powell,* 314 U.S. 402, 412; *United States* v. *Lalone,* 152 F. 2d 43 (C.A. 9); and *Walker* v. *Altmeyer,* 137 F. 2d 531 (C.A. 2).

The record lends convincing support to the Secretary's determination that a substantial part of the $300 per month "salary," paid to appellee, was not remuneration for services rendered, but, to the contrary, was a return of capital and advancements, previously made to the corporation by appellee, and which had been denominated as "wages" by appellee for the purpose of establishing a wage record which would give him maximum insurance benefits.

1. After appellee learned in 1952 that his income was excluded from coverage, he and his attorneys designed and executed a scheme whereby appellee would incorporate his business and then hire himself as an employee (R. 23, 33-34). Lindgren & Co., the corporation which was created by appellee and by which he was employed, was under the complete control of appellee, who served as its president (R. 23-25). Although the corporation was not created until February 2, 1953 (Tr. 94), appellee decided that his salary should be paid retroactive to January 1, 1953 (R. 24). Appellee further decided that this salary should be in the amount of $300 a month; in other words, exactly the maximum amount of income that could be credited to an individual's social security coverage under the then provisions of the Social Security Act. See 42 U.S.C. 409(a), 415(a)(1). Insofar as the record shows, in arriving at

the salary which the corporation was to pay appellee, no consideration was given to the reasonable expectations of the newly incorporated enterprise or to the fact that, when operated as a sole proprietorship, appellee's income from his endeavors was substantially less than $300 a month.

Any doubt as to the factors which determined appellee's salary is totally dispelled by the fact that, as soon as appellee had received the $300 monthly salary for a sufficient period of time to entitle him to full social security benefits, his salary was promptly reduced to $75 a month (R. 24), which was the maximum amount that an individual could earn without incurring any deductions from his monthly insurance payments. See, 42 U.S.C. 403(b)(1). Then, when the Social Security Act was amended in 1954, effective as of January, 1955, to allow an individual to earn $1,200 a year without losing any benefits,[13] appellee raised his salary to precisely that figure (R. 25).

In short, it is clear—and, indeed, appellee himself concedes (R. 62)—that Lindgren & Company was formed for the sole purpose of providing appellee with a wage record so that he could obtain social security benefits. Appellee's salary was established, not in accordance with the value of his services, but solely to conform with the prerequisites of the Social Security Act. When the requirements of the Act changed, appellee's salary was correspondingly changed with it.

2. As noted above, appellee himself had earned only $1,428 from his business in 1951 (see R. 22). As might well have been expected, since appellee continued to operate the business as a sole proprietorship, the earnings of the business were not appreciably increased

[13] See 42 U.S.C. (Supp. II) 403(b)(1).

after its incorporation. However valuable appellee's services were, they could not have been of greater value to the corporation than was its expected income exclusive of salaries.

Appellee, himself, of course, recognized that his $3,600 a year salary could not be made out of the corporation's gross receipts. Accordingly, he decided to "loan" the corporation a sufficient amount to cover the difference between the corporate earnings and his salary.[14] In effect, then, Lindgren received his "wages" from the corporation and then put them back into the company's account (R. 43). As noted above, however, as soon as he had obtained social security coverage, Lindgren reduced his salary to $75 a month because, as he stated, the corporation was losing money and could not afford to pay him the salary he had been receiving (R. 46).

In sum, it is clear that a considerable part of appellee's "salary" was nothing more than a bookkeeping device by which appellee was attempting to "pad" his actual income, in order to obtain a lifetime annuity from the Government.

III

Since the Court Below Did Not Pass Upon the Question as to the Correctness of the Secretary's Accounting, the Cause Should Be Remanded for That Purpose

It is clear from the foregoing that the district court's erroneous belief that the Secretary could not look

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[14] Exclusive of appellee's salary, the corporation earned $3,644.84 in 1953 and 1954 (this figure is obtained by adding the $1,200 rent owed by the corporation for 1953-1954 to the expenses listed in the corporate tax returns for those years), which is approximately $2,900 less than the $6,525 which was paid to Lindgren as "salary." Lindgren loaned the corporation $2,900 during that same period (R. 26-27).

behind the characterization as "wages" of the sums transferred to appellee was critical to its disposition of the case. As we have seen, even a cursory examination of the record before the Secretary dispels all possible doubt that, at least to some extent, the purported "salary" payments were purely fictitious.

In the court below, appellee did not restrict himself to the argument that the Secretary was prohibited from inquiring into whether the sums paid by the corporation to appellee were, in reality, salary payments. He also argued that, assuming such inquiry could be made, the Secretary made certain accounting errors in determining what portion of the payments actually represented salary.

The district court, in its mistaken view of the governing legal principles, did not reach that issue. In these circumstances, we believe that the appropriate disposition of the case would be a remand to the district court with instructions to consider the issue in the proper judicial prospective—*viz.,* that the Secretary may scrutinize transactions between a corporation and its employee who maintains sole control over said corporation and determine whether, and to what extent, the purported salary paid to such employee was "remuneration" so as to comply with the definition of "wages" set forth in Section 209 of the Social Security Act. See pp. 9-10 *supra.*

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded for further proceedings.

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JANUARY, 1959.

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